IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2694 OF 2005

1. The State of Maharashtra, through the Additional Chief Secretary (Services) General Administration Department, Mantralaya, Mumbai - 400 032.)

2. Additional Chief Secretary (Services), General Administration Department, Mantralaya, Mumbai - 400 032.)

3. Principal Secretary, Urban Development Department,) Mantralaya, Mumbai - 400 032.) ... Petitioners

(Orig. respondents)

Versus

1. Vinay Mohan Lal 31, Yashodhan, Dinshaw Vacha Road, Mumbai - 400 032.

2. Union of India, through the Secretary Department of Personnel & Training, North Block, New Delhi - 110 011.

3. Vilasrao Deshmukh, Chief Minister, Maharashtra State, Mantralaya, Mumbai - 400 032.

4. Satish Tripathi, IAS Secretary, Food and Civil) Supplies, Government of Maharashtra, Mantralaya, Mumbai - 400 032. ... Respondents

(Respondents 2 to 4 are original respondents to the O.A. and respondent 1 is original applicant to the O.A.)

Mr. Ravi M. Kadam, advocate general with Mr. R.M. Sawant, government pleader and Vinay Masurkar for the petitioners.

Mr. E.P. Bharucha, senior counsel with Ms. Kashmira Bharucha, Mr. Shetty and Ms. S.S. Marne i/b Sandeep Marne for the respondents.

CORAM: SMT. RANJANA DESAI &
ABHAY S. OKA, JJ.

DATE ON WHICH JUDGMENT
RESERVED : 28TH NOVEMBER, 2005.

DATE ON WHICH JUDGMENT
PRONOUNCED : 13TH DECEMBER 2005.

JUDGMENT :- (**Per Smt. Ranjana Desai, J.**)

1. The State of Maharashtra through the Additional Chief Secretary (Services), General Administration Department, Additional Chief Secretary (Services), General Administration Department and the Principal Secretary, Urban Development Department, Mantralaya, Mumbai, have challenged in this writ petition order dated 2/9/2005 passed by the Central Administrative Tribunal (in short, "the Tribunal") in Original Application No.293 of 2005 whereby the Tribunal has quashed and set aside order of transfer dated 24/5/2005 of respondent 1 - Mr. Vinay Mohan Lal who is the applicant in the said application. The petitioners are respondents 1, 3 and 4 respectively in the said application. Respondent 2 - Union of India is respondent 2 therein. Respondent 3 Mr. Vilasrao Deshmukh, the Chief Minister of Maharashtra is respondent 4 therein and respondent 4 Mr. Satish Tripathi, Secretary, Food & Civil Supplies Department, Government of Maharashtra, is respondent 5 therein. The Principal Secretary, Urban Development Department, Mantralaya is respondent 6 therein. We shall refer to the parties as per their status in the original application as it would be easier to understand the facts if they are so referred.

2. We may first give gist of the facts as given by the applicant in his original application. That would indicate his grievance also.

3. The applicant is a member of the Indian Administrative Services of 1970 batch allotted to Maharashtra Cadre. He held various important posts during his career. He was appointed as the Vice Chairman & Managing Director (V.C. & M.D.), City & Industrial Development Corporation (for short, "CIDCO") on 26/5/2003 when Mr. Sushilkumar Shinde was the Chief Minister of Maharashtra. According to the applicant before he completed the legally prescribed tenure of three years, he was prematurely and without any reason transferred from CIDCO on 28/12/2004 as ordered by respondent 4 Mr. Deshmukh, the Chief Minister of Maharashtra. The applicant was given order of appointment as the Chairman of the Third Maharashtra Finance Commission (for short, "TMFC") vide Notification dated 15/1/2005. As per this Notification, the applicant was to hold the office from the date on which he assumes office till 31/12/2005. According to the applicant, this appointment order was dated 28/12/2004 when the Commission was not even constituted.

4. According to the applicant, he incurred the displeasure of respondent 4 because when he was working as the V.C. & M.D., CIDCO, a proposal for allotment of land for the printing press of the son of respondent 4

was not cleared by him and because the Manjra Charitable Institutional Trust owned by some family members of respondent 4 was fined Rs.20 lacs as per CIDCO policies. Respondent 4, therefore, directed the Chief Secretary, Government of Maharashtra, to conduct administrative inquiry against the allotment of plots made during the applicant's tenure. In compliance with this order, Dr. D.K. Sankaran, conducted the inquiry against the applicant without following the principles of natural justice. According to the applicant, Dr. Sankaran did not take cognizance of correct facts and purposely made the inquiry report public. He submitted his report that CIDCO has suffered a loss of Rs.347 crores from the transactions in land carried out by the applicant. According to the applicant, he was wrongly charged with criminal intent and corruption. Only an incomplete and abridged version of the report was supplied to the applicant and he was asked to give his say within eight days. The State Government has accepted the said report and decided to initiate departmental inquiry. The State Government has also directed an inquiry through the Anti Corruption Bureau. This has been done in a haste even without waiting for the applicant's say. The applicant's case is that while working as the Chairman of TMFC, which is a post under the Constitution of India, he was outside the administrative jurisdiction of the State of Maharashtra. Since the applicant had taken strong objection to the actions initiated against him, without the approval of the Governor, the 1st petitioner proposed

to the Governor that the applicant had incurred disqualification under clause (d) of the Maharashtra Finance Commission (Misc. Short Title Provisions) Act, 1994 (for short, "the said Act") and, therefore, he should be removed from the post of the Chairman, TMFC and reverted to the administrative control of the State. The Governor did not act on it. To expedite the matter, a revised proposal was submitted by the 1st petitioner to the Governor, proposing Mr. Satish Tripathi's name for being appointed as the Chairman, TMFC in place of the 1st respondent without giving any reasons in support of the proposed change.

5. According to the applicant, there was no justification for the State to transfer the applicant from the said post vide transfer order dated 24/5/2005 when his appointment was for a fixed term i.e. upto 31/12/2005 and when such a transfer was not in the interest of functioning of the Commission. At the instance of respondent 4, the Governor accorded his approval and the State and respondent 4 posted the applicant as the M.D., MAFCO a loss making public sector undertaking of Government of Maharashtra to wreak vengeance and to humiliate and damage the applicant's reputation.

6. According to the applicant, the Additional Chief Secretary (Planning), Government of Maharashtra, who was asked to find out some irregularities about the

applicant's functioning, calculated hypothetical loss to CIDCO in illegal and irregular manner without understanding the pricing mechanism. The applicant's case is that the State wants to suspend him. The State could not have placed him under suspension since he was holding a post under the Constitution outside the administrative control of the State Government. According to the applicant, the instances cited by him in the application are clear cut cases which have resulted in respondent 4 having personal, mala fide and deep grouse against the applicant. In the circumstances, the applicant prayed that the impugned transfer order dated 24/5/2005 moving the applicant from the post of the Chairman, TMFC and the order dated 24/5/2005 posting him as M.D., MAFCO and the records relating to the reference made to Anti Corruption Bureau be quashed and set aside.

7. The respondents resisted the original application by filing their written statement. Basically it was contended by the respondents that the transfer is an incidence of service and transfer orders cannot be lightly interfered with. The allegations of mala fides were denied.

8. Before we deal with the rival contentions, it is necessary to state certain events as arguments are advanced in connection with them. The original application was filed on 30/5/2005. On 1/6/2005, the Tribunal stayed the impugned order dated 24/5/2005. The

respondents applied for vacating the stay on 15/6/2005. On 17/6/2005, the Tribunal declined to vacate the stay. On 4/7/2005, the petitioner filed Writ Petition No.1636 of 2003 challenging the Tribunal's order dated 17/6/2005. On 4/7/2005, this court set aside the Tribunal's orders granting stay and order refusing to vacate the stay. On 6/7/2005, Mr. Satish Tripathi took charge and since then he has been functioning as the Chairman of the TMFC.

9. On 29/7/2005, the applicant filed an application for amendment of the original application. He wanted to aver that the post of M.D., MAFCO is not included in Schedule III-A or III-B of the All India Services (Pay) Rules, 1954 (for short, "the said Rules") being an ex-cadre post. Therefore, unless a declaration is made by the State Government that the post of M.D., MAFCO is equivalent in status and responsibility to a post specified in schedule III, he cannot be appointed to the said post. The proposed amendment further stated that since the State Government had failed to make a declaration as provided in Rule 9 of the said Rules, the transfer order dated 24/7/2005 is ex facie illegal and deserves to be set aside. However, since the respondents filed a copy of the State Government Resolution dated 26/7/2005 stating that the post of M.D., MAFCO will be treated as equivalent to the post of the Principal Secretary to the State Government from the date the applicant assumes charge of the said post that application was filed.

10. On 8/8/2005, the Supreme Court disposed of the State of Maharashtra's special leave petition filed challenging the High Court's judgment dated 4/7/2005. Since the original application was to be heard on 29/8/2005, the Supreme Court directed the Tribunal to hear the matter on the appointed date without entertaining any request for adjournment and decide it finally. On 29/8/2005, the applicant made another application for amendment. It was stated in the application that in reply dated 22/8/2005, the respondents have enclosed a copy of the Gazette Notification dated 27/5/2005 appointing Mr. Satish Tripathi - respondent 5 as the Chairman of the TMFC. This was not known to the applicant earlier and, hence, he wants to amend the prayer clause so as to challenge order dated 27/5/2005. The said application was rejected as a belated application in view of the abovementioned direction of the Supreme Court to hear the original application on 29/8/2005. On that day, final arguments were heard and on 2/9/2005, the Tribunal quashed and set aside the order dated 24/5/2005.

11. In the impugned order dated 2/9/2005, the Tribunal has noted that the Chairman can be removed either when he incurs disqualification under Section 6 of the said Act or when he resigns from the office as mentioned in Section 7 thereof. However, as per the provisions contained in General Clauses Act, the appointing authority has a power to remove or dismiss a person

appointed by him. The Tribunal has, therefore, concluded that the Governor who is the appointing authority is also competent to remove the Chairman by following the due process of law. However, after perusing the files the Tribunal has observed that the proposal submitted to the Governor does not contain information about the tenure of the applicant, the reasons for removing him before completion of tenure and supporting legal provisions. The Tribunal has referred to the judgment of the Supreme Court in **Dr. L. P. Agarwal v. Union of India (1992) 3 SCC 526** and observed that the tenure appointee can be removed before completion of his tenure on justifiable grounds. Curtailment of such tenure can be done only by following the procedure conforming to the principles of natural justice. According to the Tribunal, in this case, principles of natural justice were violated.

12. The Tribunal has observed that the respondents have now mentioned that the State Government decided to recall the applicant since he was found to have committed gross irregularities in the allotment of land while holding the post of V.C. & M.D. CIDCO. Referring to the judgment of Supreme Court in **Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors. (1978) 1 SCC 405**, the Tribunal has observed that additional grounds cannot be offered in support of a decision after the decision is given by the statutory authority. The Tribunal was of the opinion that the fact that the applicant was appointed for a fixed tenure was a very

crucial factor and non-consideration of the said factor by the Competent Authority while taking the decision has made judicial intervention necessary.

13. The Tribunal has observed that the competent authority had to act judicially and it was necessary for the Competent Authority to inform the applicant reasons for curtailment of his tenure and if on account of administrative exigencies it was considered inappropriate to disclose the reasons to the applicant at least the grounds for curtailing the tenure should have been placed before the Competent Authority while seeking his approval. Since this was not done, according to the Tribunal order removing the applicant from the post of Chairman, TMFC. is legally not sustainable. The Tribunal has further held that the Resolution dated 26/7/05 equating the post of M.D., MAFCO to the post of Principal Secretary as well as the order appointing the applicant to the post of M.D., MAFCO are not legally sustainable because the equivalence order was issued nearly two months from the date of the impugned order and such Resolution is against the law laid down by the Supreme Court in **E.P. Royappa v. State of Tamil Nadu & Anr., (1974) 4 SCC 3**.

14. So far as the allegation that respondent 4 was biased against the applicant and, therefore, at his instance the applicant was transferred is concerned, the Tribunal has held that though the incidents cited by the

applicant have a potential of generating bias against him, it was not possible to infer that bias was the sole reason for removing the applicant from the post of Chairman, TMFC because the decision to this effect was taken at the level of the Governor. The Tribunal has concluded that the primary objection of curtailing the tenure of the applicant was to bring him under the control of the State Government from that of the Governor. In short the Tribunal has held that the appointment of the applicant to the post of Chairman TMFC was for a specific period which could be curtailed only on justifiable grounds. Since no grounds were given in the proposal submitted for the approval of the competent authority i.e. the Governor, the order issued on the basis of such approval is legally not sustainable. In view of this, the Tribunal has quashed and set aside the impugned order dated 24/5/05.

15. Mr. Kadam, the learned Advocate General appearing for the petitioners has assailed the impugned order on several counts. He submitted that under the said Act, the Governor is designated as an appointing authority for appointment of the Chairman of TMFC. The Chairman is to hold office for such period as may be specified in the order appointing him. By Notification dated 15/1/2005, the Governor of Maharashtra appointed the applicant as the Chairman of TMFC. He was to hold the office from the date he assumes office upto 31/12/2005. In the meanwhile, it came to light that there were certain

irregularities in allotment of plots/lands of CIDCO during the time when the applicant was the Chairman and M.D. of CIDCO i.e. between 26/5/2003 to 28/5/2004. A discrete preliminary enquiry was ordered by the Government and Dr. D.K. Sankaran, A.C.S. (Planning) was directed to conduct the preliminary enquiry on 31/3/2005. Dr. Sankaran submitted a detailed report running into three volumes reporting that there are huge financial losses to CIDCO to the tune of Rs.347 crores on account of various irregularities committed during the tenure of the applicant as V.C. & M.D. of CIDCO. In April, 2005, a public interest litigation was filed in this court placing reliance on Dr. Sankaran's report and alleging allotment of CIDCO plots to dummy co-operative societies at highly concessional rates. On 20/4/2005, the said petition was admitted and this court restrained the developers from selling any flats and directed them to furnish a bank guarantee for the apprehended loss of Rs.36.55 crores as a pre-condition for continuing developmental activities. It was, therefore, considered prudent to transfer the applicant from the post of Chairman of TMFC in public interest.

16. Mr. Kadam pointed out that the action taken by the petitioners is vindicated by the judgment of the Division Bench of this court finally disposing of the said public interest litigation. He took us through the said judgment dated 28/10/2005 wherein in several paragraphs this court has commented on dereliction of

responsibilities on the part of the applicant and has expressed that the State Government and CIDCO should take appropriate action against the concerned persons. He led stress on the observations of the Division Bench that there was grand plan to take advantage of the poverty and lack of understanding and ignorance of the people and this plan could not be executed unless the original chief promoters, the builders and the officers of CIDCO at the higher level such as the M.D. were party to it. The learned Advocate General contended that such is the extent of irregularities committed in the allotment of plots during the time when the applicant was holding the post as V.C. & M.D. of CIDCO that this court has forfeited the constructions made by the builders and several other directions have been issued. The learned Advocate General contended that it can no longer be argued that the transfer of the applicant was not warranted or was illegal or that there was any colourable exercise of power. The learned Advocate General relied on several judgments of the Supreme Court to emphasise that the transfer of an employee is not only an incidence of service inherent in the terms of employment but also implicit as an essential condition of service. He submitted that the person holding transferable post has no legal right to insist for his continuance at any particular posting. In support of this, the learned Advocate General relied on the judgments of the Supreme Court in **Union of India & Ors. v. Janardhan Debanath, (2004) 4 SCC 245; State of U.P. & Ors. v.**

Govardhanlal, (2004) 11 SCC 402; Kendriya Vidyalaya Sangathan v. Damodar Prasad Pandey & Ors., (2004) 8 SCALE 188; State of U.P. & Anr. v. V.N. Prasad, (1995) Supp. (2) SCC 151; N.K. Singh v. Union of India (1994) 6 SCC 98 and Union of India & Ors. v. H.N. Kirtania (1989) 3 SCC 445. Relying on **Janardhan Debanath's case (supra)**, the learned Advocate General contended that for the purposes of effecting a transfer, there is no requirement to hold a detailed enquiry.

17. The learned Advocate General pointed out that since the applicant was appointed as Chairman of TMFC by the Governor of Maharashtra, the approval of the Governor of Maharashtra was sought as he was the appointing authority. A proposal was placed before the Governor. On 2/5/2005, the three volumes of Dr. Sankaran's report were forwarded to the Governor for his consideration. The note of the Urban Development Department in which details of facts which emerged from Sankaran's report were mentioned, was brought to the notice of the Governor. On 19/5/2005, the applicant made a detailed representation as to why no approval should be granted. Therefore, the Governor was fully seized of all the relevant material. On 24/5/2005, the Governor approved the file and a Notification was issued appointing Mr. Satish Tripathi in place of the applicant as Chairman of TMFC. The Governor as an appointing authority curtailed the tenure of the applicant as Chairman of TMFC. He was transferred to the post of Chairman of MAFCO. There are,

therefore, no irregularities or illegalities in this transfer. The learned Advocate General further contended that the transfer order is not punitive and does not affect the applicant financially or otherwise. It does not affect his service conditions and, therefore, the Tribunal ought not to have interfered with the order of transfer. In the absence of any prejudice to the applicant, interference by the Tribunal is erroneous and contrary to law.

18. Mr. Kadam further contended that the applicant has expressed his apprehension that if he joins the post of M.D., MAFCO, he would be under the administrative control of the petitioners and would be suspended. He is thus trying to avoid any disciplinary action being taken against him. The learned Advocate General further pointed out that the applicant's challenge is to the order of transfer from the post of Chairman of TMFC and the order appointing him as M.D. of MAFCO. The applicant never pleaded that the post of Chairman, TMFC is a tenure post and cannot be curtailed. The order of the Governor which was gazetted in Notification dated 27/5/2005, whereby the applicant ceased to be the Chairman of TMFC and Mr. Satish Tripathi was appointed as Chairman was not the subject matter of challenge in the original application. At a belated stage, the original application was sought to be amended. The amendment application was rejected. Thus the order of the Governor dated 27/5/2005 was not challenged. The

Tribunal was, therefore, dealing with a simplicitor case of a challenge to a transfer. The Tribunal, therefore, should not have widened the scope of its enquiry. In fact, the Tribunal exceeded its jurisdiction and transgressed beyond the pleadings. The argument that the order of the Governor dated 27/5/2005 was not served on the applicant must be rejected because the order was gazetted on 27/5/2005 and the applicant is deemed to have the knowledge of the same.

19. The learned Advocate General took us to Articles 243(1) and 243(1)(2) and Article 280 of the Constitution of India. He submitted that on a fair reading of these Articles, it is clear that the Governor, while appointing the applicant as Chairman of TMFC, acted as a statutory appointing authority. He was not exercising constitutional powers. Since the Governor was exercising powers as the statutory authority, the embargo under Article 361 of the Constitution of India was not applicable and, hence, the Governor ought to have been impleaded as a party respondent. He submitted that since the Governor was not impleaded as a party respondent, it was wrong on the part of the Tribunal to make any observations against him in his absence. In this connection, he relied on a Full Bench judgment of the Punjab and Haryana High Court in **Hardwarilal Rohtak v. G.D. Tapase, AIR 1982 P&H 439.** The learned Advocate General further contended that the post of the Chairman of TMFC is not a tenure post. There is no period of

tenure specified in any Act or Rule for the said post and the period is left to the discretion of the appointing authority. He submitted that the reading of the said Act makes it apparent that the Chairman of TMFC is to hold the office at the pleasure of the appointing authority and, therefore, the appointment was terminable at will. The Governor had every authority to curtail the period mentioned in the appointment order. In this connection he relied on the judgment of the Supreme Court in **Pu Myllai Hiychho v. State of Mizoram, (2005) 2 SCC 92**. Mr. Kadam submitted that the reliance placed by the Tribunal in **L.P.Agarwal's case (supra)** is misplaced because in that case, the Supreme Court was considering as to whether in respect of a tenure post, the concept of superannuation is applicable. He took us to the judgment of the Supreme Court in **S.K. Kaicker v. All India Institute of Medical Sciences, (1996) 10 SCC 734**, and pointed out that in a case where the appointee continues to hold a lien and is reverted back without any loss or prejudice, he cannot make a grievance that he was holding the tenure post and it was curtailed without justification. The learned Advocate General further contended that assuming the post of Chairman of TMFC is a tenure post, the Governor has power to curtail the tenure and has validly done so. So far as the argument that the applicant ought to have been issued a show cause notice or given a hearing is concerned, the learned Advocate General relied on the judgment of the Supreme Court in the case of **State of Maharashtra vs. Jalgaon Municipal**

Council, (2003) 9 SCC 731, and contended that the principles of natural justice is not inflexible rule. Circumstances of each case will have to considered and it must be ascertained as to whether any real prejudice is caused to a person. In this case, there is no prejudice caused to the applicant because his service conditions are not changed. The learned Advocate General pointed out that the approval of the Governor was sought only in the context of findings of Dr. Sankaran's report and the approval of the same was also granted in that context and, therefore, there is no substance in the allegation that irregularities in allotment is an afterthought. The learned Advocate General contended that the Tribunal fell into a serious error in holding that the resolution dated 26/7/2005 declaring the post of M.D., MAFCO as equivalent to the post of Principal Secretary is not legally sustainable because the same was not challenged in the original application. Besides, it is the applicant, who insisted that he could not be transferred to the post of M.D., MAFCO, without the post being declared as equivalent. The request of the applicant was acceded to and the post of M.D., MAFCO was declared equivalent to the post of Principal Secretary. The applicant was, therefore, estopped from raising this contention. The learned Advocate General pointed out that the allegations of mala fides have been rejected by the Tribunal. Finally, he drew our attention to the judgment of the Supreme Court in **Centre for Public Interest Litigation & Anr. vs. Union of India, (2005) 8 SCC 202**, where the

Supreme Court was considering the appointment of a person against whom there were serious allegations, as Chief Secretary of the State Government. The Supreme Court observed that postings of officers holding sensitive post should be done in a transparent manner giving no scope for any grievance. The Supreme Court further observed that the Government should not wait for the final report and directed the State Government to transfer the employee to some other post where she belonged. The learned Advocate General concluded by saying that in the face of preliminary findings of Dr. Sankaran's report, the observations of the two Division Benches of this court made at the interim stage of this case and in the face of the observations of the Supreme Court in **Centre for Public Interest Litigation's case (supra)**, the Tribunal ought not to have interfered with the transfer of the applicant which was completely in furtherance of public interest. He, therefore, submitted that the impugned order be set aside.

20. Mr. Bharucha, the learned counsel appearing for the applicant on the other hand supported the Tribunal's order. He submitted that Governor by Notification dated 15/1/05 appointed the applicant as Chairman of the TMFC to hold office upto 31/12/05 i.e. for a fixed period or tenure. The State by impugned order dated 24/5/05 purported to transfer the applicant as M.D., MAFCO. Though the said order is couched as a transfer, it is not a routine transfer but an excuse to reduce the tenure of

a statutorily appointed post. Further unlike a routine transfer this order meant shifting the administrative control of the applicant from Governor to the State Government.

21. Mr. Bharucha pointed out that the Chairman of TMFC can be removed only under the provisions of the said Act. Either a person has to incur disqualification under Section 6 of the said Act or he ceases to hold office by resignation as provided under Section 7 of the said Act. The said Act does not provide any other manner in which the Chairman can cease to hold the office. Since none of the contingencies set out in the said Act were present, the applicant could not have been removed from his post of TMFC as sought to be done by the State by the impugned order as a part of routine transfer.

22. Mr. Bharucha contended that the impugned order is passed by the Governor without hearing the applicant. The order does not record any reasons nor were any reasons submitted to the Governor and, therefore, the impugned order is passed without following due process of law. Relying on the judgment of the Supreme Court in **Dr. L.P. Agarwal's case (supra) and Boolchand v. Chancellor, Kurukshetra University, A.I.R. 1968 S C 292**. Mr. Bharucha contended that once a person is appointed to a tenure post his appointment to the said post comes to an end only on completion of the tenure unless curtailed on justifiable grounds. He submitted that the

decision of the appointing authority to terminate the appointment must be based upon the result of an enquiry held in the manner consistent with the basic concept of justice and fairplay. He submitted that there is a complete absence of fairplay in this case. Mr. Bharucha contended that the Governor's order does not indicate that any material was placed before the Governor on the basis of which he could have come to a conclusion that the tenure appointment needs to be curtailed and the State has sought to improve its case by referring to Sankaran's report in the affidavit. He referred to **Mohinder Singh Gill's case (supra)** and contended that such a course is not permissible.

23. Mr. Bharucha submitted that the case of the State that it does not want the applicant to hold the important post of Chairman, TMFC on account of Sankaran's report is not correct because there is sufficient indication in the record to establish that the State has never regarded the post of Chairman, TMFC as an important post. Mr. Bharucha contended that the respondents have described the post of TMFC as an important post and, therefore, moving the applicant from that post to the junior post of M.D., MAFCO would result in lowering of his status.

24. Mr.Bharucha further contended that the Tribunal has rightly held that the post of M.D., MAFCO was not equivalent to the post of Chief Secretary as per Rule 9 (1) of the said Rules. Unless a declaration was made by

the State making the said post equivalent in status with a post of Principal Secretary included in Scheduled III to the said Rules, the applicant could not have been transferred to the said post. He submitted that the subsequent order of equivalence is artificial, made merely with a view to covering the illegality of transferring the applicant to a lower post. In this connection he referred to **Royappa's case (supra)**.

25. Mr. Bharucha further submitted that the Governor's order was never served on the applicant and, therefore, the applicant could not have challenged it. He submitted that in fact the applicant had filed an application for amendment of the original application to challenge the Gazette Notification dated 27/5/05. However, the Tribunal did not allow the said application.

26. Mr. Bharucha then pointed out that the Governor could not have been made a party by the applicant because the Finance Commission is constituted by the Governor pursuant to the constitutional duty cast by Article 243 (1) (i) of the Constitution of India. Article 243 (1) (ii) merely delegates to the said legislature the task of providing the composition of the commission, the qualifications of members and the manner of selection. The Governor thus while constituting the commission acts in his capacity as the Governor under the Constitution of India and not merely as an appointing authority under the statute.

27. Article 361 provides that the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office. Therefore, the applicant has rightly not joined the Governor as a party respondent.

28. The learned counsel then contended that Sankaran's report is misconceived. No opportunity was given to the applicant to give his explanation to the allegations made against him and, therefore, this one sided report cannot be relied upon. Mr. Bharucha contended that the judgment of this court in the Public Interest Litigation petition on which reliance is placed by the petitioner also cannot be used against the applicant because the applicant was not joined as a party in the said petition.

29. Mr. Bharucha further submitted that there is no substance in the allegation that the applicant is trying to avoid an enquiry and for that purpose he has filed the present proceedings. He submitted that the applicant, however, apprehends that he may be victimised because approval from an independent appointing authority like Governor would have been a safeguard against initiation of a vindictive enquiry. Mr. Bharucha submitted that the applicant would welcome an enquiry by an independent enquiry officer of unimpeachable integrity. Mr. Bharucha submitted that the action of the State Government is mala fide and illegal. The Tribunal has

come to a right conclusion that it is illegal and hence no interference is necessary with the impugned order.

30. Though the impugned order has been challenged by the learned Advocate General on several counts, we are of the opinion that it is not necessary to deal with them because in our opinion the Tribunal's order can be faulted on two counts, which go to the root of the matter. The Tribunal has taken a view that the applicant was appointed for a fixed tenure and this fact was not brought to the notice of the Governor. The Tribunal has held that the cases cited by the respondents are distinguishable because they only relate to ordinary transfers pertaining to non-tenure posts orders. The Tribunal has held that the reasons of curtailment ought to have been informed to the applicant or they should have been placed before the Governor. In the concluding paragraph, the Tribunal has held that appointment of the applicant to the post of Chairman, TMFC was for a specific period which could be curtailed only on justifiable grounds. It is further observed that since no grounds were given in the proposal submitted for the approval of the competent authority, the order issued on the basis of such approval is legally not sustainable and another part of the impugned order posting the applicant as M.D., MAFCO is not in conformity with the law laid down by the Supreme Court and, therefore, cannot be sustained.

31. We have given the gist of the original application on purpose. The applicant has not raised a contention that he was holding a tenure post and its curtailment was without justifiable grounds. The applicant has merely stated at some place that the applicant was appointed for a fixed period. He has in fact made grievance about the transfer. In paragraph 4.22, he has stated that there was no justification for respondent 1 to transfer him from the post of Chairman, TMFC when his appointment was for a fixed term and when such a transfer was not in the interest of functioning of the Commission. The prayer clause is very significant. He has prayed that the impugned order dated 24/5/2005 moving him from the post of the Chairman of TMFC and the order dated 24/5/2005 posting him as M.D., MAFCO, be set aside. Therefore, challenge is to the transfer and not specifically to the order of the Governor of the curtailment of the tenure. The State Government also has not come out with the pleading before the Tribunal that for justifiable reasons the Governor passed the order reducing the tenure or that the post of Chairman, TMFC was held during the pleasure of the Governor. Though the primary duty was on the applicant to come to the court with proper pleadings which he has failed to carry out, the respondents' pleadings are also not satisfactory.

32. It must also be noted that though the learned Advocate General has contended that the applicant was aware of the order passed by the Governor, it is an

admitted position that the applicant was not served with a copy of the said order. In fact, the notes submitted by the Principal Secretary, General Administration Department on 10/5/2005 before the Governor and the endorsement of the Governor made thereon were produced by the State Government, for the first time, during the course of final hearing before the Central Administrative Tribunal. In the affidavit in reply filed by the State Government on 13/6/2005, there is no reference at all to any orders passed by the Governor reducing the tenure of the applicant. While dealing with paragraph 4.22 of the application, all that has been stated is that respondent 5 - Mr. Satish Tripathi has been appointed as Chairman of TMFC in place of the applicant with prior approval of the Governor. In the entire reply, there is no reference to the note placed before the Governor and the approval of the Governor upon the note as well as the gazette notification issued on 27/5/2005. It is only in the additional written statement filed on behalf of the State Government on 22/8/2005 that the State Government has, for the first time, relied upon the order dated 27/5/2005 and it was contended that though the original application was filed on 31/5/2005, the applicant has not challenged the order dated 27/5/2005. It must be noted here that the order dated 27/5/2005 is a gazette notification which states that the original notification dated 15/1/2005 appointing the applicant as Chairman stands modified by substituting the name of Mr. Satish Tripathi in place of the applicant. Even in the additional written statement,

the State Government has not placed reliance on the note placed before the Governor and the order made thereon by the Governor.

33. So far as the applicant is concerned, he sought to challenge the order dated 27/5/2005 by making amendment application being Misc. Petition No.493 of 2005 on 24/8/2005. It was contended in the application that the said order dated 27/5/2005 was not served on the applicant and he came to know about it only when respondents 1, 3 and 6 brought on record copy of the said order along with their additional reply dated 22/8/2005. There is some substance in the argument advanced by the learned Advocate General that the order dated 27/5/2005 was gazetted and, therefore, the applicant must be deemed to have knowledge of the same but the fact remains that even the State Government relied upon the said order, for the first time, seven days before the date on which the original application was heard finally.

34. The application tendered by the applicant on 24/8/2005 for amendment of the original application to challenge the order dated 27/5/2005 was rejected by the Tribunal on the ground that it was belated; that there was a direction from the Supreme Court to hear the application on 29/8/2005 and that the applicant had challenged the order of his transfer from TMFC and non appointment of respondent 5. We have perused the order of the Supreme Court. In our opinion, the Supreme Court

order did not prevent the Tribunal from allowing the amendment to the application if the exigencies required such amendment to be granted. In any case, assuming it does, since the entire material was before the Tribunal, after allowing the application, the Tribunal could have taken up the matter for hearing immediately. In fact, after rejecting the application on 29/8/2005, the Tribunal heard final arguments and reserved the matter for orders and the impugned order was passed on 2/9/2005. In our opinion, the Tribunal ought not to have rejected the amendment application because challenge to the order dated 27/5/2005 was very vital. The result of this is that by setting aside the transfer order dated 24/5/2005, the Tribunal has, in effect, set aside the order passed by the Governor appointing respondent 5 - Mr. Satish Tripathi to the post of Chairman, TMFC in the absence of pleadings. That was not even the specific prayer of the applicant. The applicant's prayer in the original application is that the impugned transfer order dated 24/5/2005 moving the applicant from the post of the Chairman, TMFC and the order dated 24/5/2005 posting him as M.D., MAFCO be set aside. The Tribunal's order has resulted in setting aside order dated 27/5/2005 which is a gazette notification issued by the State Government on the basis of acceptance of the proposal placed before the Governor. Without their being any specific challenge to the said order and to the order of the Governor reducing the tenure of the applicant, the order dated 27/5/2005 could not have been set aside. Besides the question of

considering whether the Governor was a necessary and proper party will arise provided there were proper pleadings incorporating challenge to the order passed by the Governor. This is one reason why the matter needs to be remanded to the Tribunal.

35. Another error committed by the Tribunal is that without there being any challenge that the post of M.D., MAFCO was not equivalent to the post of Chief Secretary as per Rule 9(1) of the said Rules, the Tribunal went into that aspect and held that subsequent order of equivalence is artificial. The Tribunal erred in holding that the resolution dated 26/7/2005 equating the post of M.D., MAFCO to the post of Principal Secretary is not sustainable without there being any pleadings to that effect. One of the reasons why the Tribunal has held that order appointing the applicant to the post of M.D., MAFCO is not legally sustainable is because the Resolution dated 26/7/2005 equating the said post to the post of Principal Secretary is bad in law. That Resolution has been stuck down on the basis of **E.P. Royappa's case (supra)**.

36. In **E.P. Royappa's case (supra)**, the Supreme Court dealt with Rule 9(1) of the said Rules. Rule 9 thereof reads thus:

> "(1). No Member of the Service shall be appointed to a post other than a post

specified in Schedule III, unless the State Government concerned in respect of posts under its control, or the Central Government in respect of posts under its control, as the case may be, make a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule.

(2) The pay of a member of the Service on appointment to a post other than a post specified in Schedule III shall be the same as he would have been entitled to, had he been appointed in the post to which the said post is declared equivalent."

37. In paragraphs 82 and 83 of the said decision, what has been held by the Supreme Court can be summarised as under:

i) Making a declaration contemplated by Sub-rule (1) of Rule 9 is a sine qua non for the exercise of power under sub-rule (1) and it is not an idle formality which can be dispensed with at the sweet will of the Government.

ii) The determination of equivalence is made a condition precedent before a

member of Indian Administrative Service can be appointed to a non cadre post under sub-rule(1) and this is a mandatory requirement which must be obeyed.

iii) The State cannot artificially create equivalence by saying that the particular non-cadre post, whatever may be the nature and responsibilities of the functions and duties attached to it, shall be in the rank or grade of any cadre post it likes.

iv) The status and responsibility of a non-cadre post for the purpose of determining equivalence cannot depend on who is going to occupy it and the equivalence in status and responsibility is required to be determined on an objective assessment of the nature and responsibilities and the functions and duties attached to the post.

v) Though declaration of equivalence is imperative, it is not conclusive in the sense that it can never be questioned. It would be open to a

> member of the Indian Administrative Service to contend notwithstanding the declaration of equivalence that non cadre post to which he is appointed is in trust and reality inferior in status and responsibility to that occupied by him and his appointment to such mon cadre post is in violation of Article 311 or Articles 14 and 16. The burden of establishing this would be undoubtedly very heavy and the Court would be slow to interfere with declaration of equivalence made by the Government.

38. The issue involved before the Tribunal was whether the post of M.D., MAFCO was equivalent to the post of Principal Secretary. The other issue was whether the consideration of equivalence and declaration of equivalence was a condition precedent for exercise of power under sub-rule (1) of Rule 9 of making appointment to a post other than a post specified in Schedule III. So far as the second question is concerned, it prima facie appears that it is covered by the Supreme Court's judgment in **E.P.Royappa (supra),** which holds that the making of such a declaration contemplated by sub-rule (1) is a sine qua non of the exercise of power under sub-rule (1). The requirement of making a declaration is mandatory. Sub-rule (1) of Rule 9 specifically says that

no member of the service shall be appointed to a post other than a post specified in Schedule III unless the concerned Government makes a declaration that the said post is equivalent in status and responsibility to a post specified in the Schedule. In this case admittedly the exercise has been done by the State Government two months after appointing the applicant to a post other than a post specified in Schedule III. To that extent, it appears that there may be violation of sub-rule (1) of rule 9. However, this aspect will be relevant only when the applicant proves that his removal from the post of the Chairman of TMFC is contrary to law and could have been considered only if there were pleadings to that effect.

39. An application being Misc.Petition No.453 of 2005 was filed on 29/7/2005 by the applicant seeking amendment to the original application. By the said application, paragraph 4.30 was sought to be added in the original application for raising the contention that the post of M.D., MAFCO is not equivalent in status and responsibility and a declaration as required by rule 9(1) of the said Rules is not made. Therefore, a contention was sought to be raised that the appointment to the post of M.D., MAFCO is illegal and void on that ground. The said Misc.Petition No.453 of 2005 was considered by the Tribunal on 29/8/2005 along with Misc.Petition No.493 of 2005. On the same day the Tribunal finally heard the original application. While dealing with the said Misc.Petition No.453 of 2005 the Tribunal observed that

subsequently the Government has passed a Resolution dated 26/7/2005 declaring equivalence and therefore, the Tribunal observed that Misc.Petition No.453 of 2005 should be treated as filed. It is apparent that the contentions which were sought to be raised by way of amendment ought to have been raised in the original application itself as the said contentions were very much available when the original application was filed. However, the Tribunal could not have declined to grant amendment on the ground that a subsequent declaration was issued by the State Government. Moreover, a finding on the aspect of equivalence could not have been recorded by the Tribunal without allowing the applicant to carry out the amendment and without permitting the State to deal with the amendment. The order of the Tribunal directing that the application be filed is obviously erroneous and the amendment sought by Misc. Petition No.453 of 2005 ought to have been allowed. If the said amendment is to be allowed surely the petitioner-State must get an opportunity to submit reply dealing with the amended application. This is another ground why the order of remand will have to be passed.

40. We are conscious of the fact that the term of the applicant as Chairman of the TMFC will expire on 31/12/2005. However, in the original application filed by the applicant there are no proper pleadings and the applications for amendment seeking amendment to the original application were not allowed. Without allowing

the applications for amendment, the Tribunal has dealt with merits of the contentions raised in the proposed amendment which were sought to be incorporated by the said two applications. It cannot be said that the issues involved in the original application have become academic. The issues involved do not just relate to removal of the applicant from the post of Chairman of the TMFC. The issue regarding legality and validity of the appointment of the applicant to the post of M.D., MAFCO is also involved in this case.

41. We have also referred to a very vital subsequent event. This court has disposed of PIL No.43 of 2005 on 28/10/2005 relating to irregularities in the allotment of CIDCO plots. The learned Advocate General has placed heavy reliance on the same because this court has commented on dereliction of responsibilities on the part of the applicant. Mr. Bharucha, the learned counsel for the applicant has contended that the applicant is not party to the said petition and, hence, the said judgment cannot be used against the applicant. We do not want to express any opinion on this aspect. Since we are remanding the matter, the Tribunal will have to consider whether the said judgment has any relevance to the present case.

42. In the circumstances we pass the following order:

O R D E R

(i) The impugned Judgment and Order dated 2/9/2005 is quashed and set aside. Original Application No.293 of 2005 is remanded to the Tribunal for considering the same afresh.

(ii) Misc.Petition No.493 of 2005 and Misc. Petition No.453 of 2005 are allowed. The applicant will carry out the amendment immediately. The petitioner will file reply to the amended original application within a period of one week from today.

(iii)The parties are directed to appear before the Tribunal on 14/12/2005. On that day the Tribunal will finalise the schedule for hearing. It will not be necessary for the Tribunal to give a separate notice of the date fixed for hearing. It is obvious that the Tribunal will decide the same by giving necessary priority considering the facts of the case and the urgency involved.

(iv) Subject to what is stated in the judgment, all contentions of the parties are kept open.

(v) Writ petition is disposed of in the aforestated terms.

(vi) Parties and the Tribunal to act on an authenticated copy of the order.

(SMT. RANJANA DESAI, J.)

(ABHAY S. OKA, J.)